**U.S. Department of Justice**

*United States Attorney*
*Southern District of New York*

*The Silvio J. Mollo Building*
*One Saint Andrew's Plaza*
*New York, New York 10007*

January 26, 2017

**BY ELECTRONIC MAIL**

The Honorable Richard M. Berman
United States District Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

Re: *United States* v. *Rayshawn Barnes et al.*, S2 15 Cr. 288 (RMB);
*United States* v. *Rashawn Davidson*, 15 Cr. 310 (RMB);
*United States* v. *Rashawn Davidson*, 08 Cr. 821 (RMB)

Dear Judge Berman:

The Government respectfully submits this letter to address several issues on which the Court directed the parties to confer after the final pretrial conference on January 21, 2017, and other matters that the Court may find relevant before trial:

*First*, the Court directed the Government to confer with defendant Rashawn Davidson regarding his request for a hearing concerning certain testimony by a potential cooperating witness under *United States* v. *Massiah*, 377 U.S. 201 (1964). The Government does not intend to call that cooperating witness in its case in chief. The Court thus need not resolve that issue absent further unexpected developments.

*Second*, the Court directed that the parties submit a limiting instruction concerning the consideration the jury can, and cannot, attach to the prior convictions of the defendants admitted as evidence. Attached to this letter is an instruction on that topic developed by the parties.[1]

*Third*, at the pretrial conference, the Court ruled that evidence concerning defendant Omar Sharpe's distribution of crack cocaine and possession of a firearm with certain co-conspirators on January 9, 2009 was admissible as direct proof of the charged crimes. Counsel for Sharpe then suggested that this evidence was inadmissible because the state had classified the offense as a youthful offender adjudication. The Court directed the parties to confer on this matter. The parties have resolved this matter by agreeing that the Government will introduce the defendant's allocution to this crime, but not the underlying youthful offender adjudication certificate, which, Sharpe maintains, differs from a certificate of conviction.

[1] All parties have conferred on this instruction and the Government believes that it includes the content each requested, but not every defendant has confirmed agreement with the final wording.

*Fourth*, the Government learned today that defendant Trojan Hart will be reneging on numerous stipulations that were previously agreed in principle. This will likely result in a longer trial than anticipated. The Government will endeavor to work with the defendants to minimize the impact on the current schedule. In addition, the Government will need to supplement its current witness list once it identifies the witnesses appropriate to introduce evidence that had previously been agreed would be admitted by stipulation. The Government will provide this list to the Court no later than 9 a.m. on January 30, 2017.

*Fifth*, as the Court is aware, in its pretrial motions, the Government moved *in limine* to preclude argument and cross-examination concerning "recent political events, 'stop and frisk' policies and practices, allegations of racial discrimination in policing, and unrelated alleged police misconduct or brutality in the recent news." Dkt. 387, at 25. The Government understood that, at the pretrial conference, the Court had granted this motion, finding that Davidson had not proffered a good-faith basis for Davidson to introduce these topics. *See* Tr. at 17-20. In discussions with the Government, however, Davidson's counsel has indicated that he believes the Court did not make such a ruling, and that he may properly advance argument and examination indicating that the defendant's race and allegations of racial bias in police procedures such as "stop-and-frisk" practices. The Government therefore respectfully requests that the Court clarify the ruling on this matter prior to opening statements in this case.

*Sixth*, at the suppression hearing held earlier today, the Court ruled that Sharpe's statements made to NYPD Sergeant Glover were not taken in violation of *Miranda*, and could be admitted as a past recollection recorded under Federal Rule of Evidence 803(5). Counsel for Sharpe has, however, informed the Government that Sharpe does not believe the Court has ruled on Sharpe's related objection that the statement is more prejudicial than probative, and thus should be excluded under Rule 403. The Government therefore respectfully requests that the Court rule on this question prior to presentation of evidence in this case. The issue of prejudice and probative value is briefed in Sharpe's opposition to the motions *in limine* (Dkt. 400 at 4) and the Government's reply (Dkt 432 at 4-6).

*Seventh*, the parties have conferred, but not reached agreement, on a potential request by the defendants that the Court modify its usual practices with respect to the number of peremptory challenges. The Government does not believe that any increase in peremptory challenges is necessary, but to the extent the Court were inclined to grant an increase, respectfully requests that any increase in defendants' challenges be conditioned on a proportional increase in the Government's challenges. *See United States* v. *Gleason*, 616 F.2d 2 n.20 (2d Cir. 1979).

Respectfully submitted,

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